

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of HEAVYN ELIZABETH
BATCHELOR, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MICHELENE BATCHELOR,

Respondent-Appellant,

and

WILLIAM BATCHELOR,

Respondent.

In the Matter of HEAVYN ELIZABETH
BATCHELOR, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

WILLIAM BATCHELOR,

Respondent-Appellant,

and

MICHELENE BATCHELOR,

UNPUBLISHED

October 12, 2006

No. 267768

Oakland Circuit Court

Family Division

LC No. 04-694368-NA

No. 267769

Oakland Circuit Court

Family Division

LC No. 04-694368-NA

Respondent.

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother appeals as of right from the trial court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (g), (i), (j), and (l), and respondent-father appeals as of right from the same order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g) and (j). We conditionally affirm the trial court's termination order, but remand the case so that the trial court and the petitioner can provide proper notice to any interested tribe as required by the Indian Child Welfare Act.

This Court reviews a trial court's decision to terminate parental rights for clear error. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). If the trial court determines that petitioner established the existence of one or more statutory grounds for termination by clear and convincing evidence, the trial court must terminate respondent's parental rights unless it determines that to do so is clearly not in the child's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 352-353; 612 NW2d 407 (2000). This Court also reviews the trial court's best interests determination for clear error. *Id.* at 356-357.

The minor child was brought into care in June 2004 because she tested positive for cocaine at birth. Respondent-mother claimed that she had been raped and forced to take drugs, she had not received prenatal care during her pregnancy, and respondents did not have baby supplies to care for the minor child. Petitioner attempted to work with respondents but they were not cooperative. Eight months later, the petition to terminate respondents' parental rights was filed, alleging that respondent-mother had her rights to five other minor children terminated, that respondents failed to comply with the terms of their parent agency agreements, and that respondents were not able to properly parent the minor child given the minor child's numerous health problems.

With regard to respondent-mother, the trial court did not clearly err in finding that the evidence was clear and convincing to show that the conditions that led to adjudication continued to exist and there was no reasonable likelihood that they would be rectified within a reasonable time given the minor child's age. MCL 712A.19b(3)(c)(i). Clearly respondent-mother had not addressed her substance abuse issue. She stood by her story that the minor child tested positive for cocaine because she had been kidnapped from a bus stop and forced to smoke something. The trial court found respondent-mother's testimony to be incredible regarding her kidnapping and forced drug use. Because respondent-mother refused to admit to having an issue with substance abuse, it was impossible for her to successfully address the problem. Even the most basic steps, such as attending the substance abuse evaluation and obtaining substance abuse treatment, were not accomplished. Respondent-mother's parental rights to three other children were terminated in 2002 because of drug abuse. The minor child at issue was born approximately two years later addicted to cocaine, and respondent-mother did not do anything to address her substance abuse issue after the minor child was born.

In addition, the trial court did not clearly err when it found that respondent-mother did not provide proper care and custody for the minor child and would be unable to do so within a reasonable time considering the age of the child, MCL 712A.19b(3)(g), and that there was a reasonable likelihood the minor child would be at risk of harm if returned to the care of respondent-mother, MCL 712A.19b(3)(j). Respondent-mother did not get an income-producing job, which was required by her parent agency agreement so that the minor child could be properly cared for. Respondent-father's SSI benefits would not be enough to provide for respondents and the minor child in the home. Since respondent-father's ability to earn income was limited, it was critical that respondent-mother contribute to the family's available resources, which she did not do. Respondent-mother continued to blame others and did not realistically address her own issues. The trial court found respondent-mother's demeanor and behavior on the witness stand to be extremely inappropriate and even outrageous at times and expressed concern over her ability to remain calm dealing with the minor child, who had special needs and medical issues.

With regard to MCL 712A.19b(i) and (l), respondent-mother admitted that three other children came into care because of her drug use and that her parental rights to these children were terminated in 2002. Respondent-mother blamed the DHS worker and others for the fact that she lost her parental rights to these children, yet approximately two years after her rights to these three children were terminated the minor child was born addicted to cocaine. The trial court clearly did not err when it found these statutory subsections were met by clear and convincing evidence.

Respondent-mother did not raise the issue of the reasonableness of the efforts of DHS or services provided to her at the time of the termination trial. Failure to raise this issue at trial results in a waiver of the right to raise that issue on appeal. *People v Coons*, 158 Mich App 735, 740; 405 NW2d 153 (1987). However, the evidence is clear that respondent-mother was provided with many services and failed to follow through or take advantage of those services. She cannot now claim that sufficient services were not offered.

The trial court did not err when it terminated respondent-father's parental rights to the minor child pursuant to MCL 712A.19b(3)(g) and (j). Respondent-father had an extensive criminal record. His SSI benefits of \$587 a month were clearly inadequate to provide for the minor child. He received these benefits because of a problem with depression yet admitted to refusing to take medication to address this issue. The trial court's finding that respondents presented themselves as a unit with respect to caring for the minor child and had not presented a plan that showed a reasonable expectation that they could provide proper care and custody for the minor child given her special needs was not clearly erroneous. In addition, the trial court did not err when it found that there was a reasonable likelihood the minor child would be harmed if returned to the care of respondent-father.

The trial court did not err in its best interests determination with regard to both respondents. The minor child had some needs that required special care for both her developmental issues as well as her medical care. The trial court was correctly concerned about respondent-mother's ability to adequately meet these needs. At the time of the termination trial, respondent-mother was pregnant again and during this pregnancy had tested positive for cocaine on at least two occasions. A psychological evaluation predicted her prognosis to be poor with regard to parenting a child and found that respondent-mother had no insight into how her

behavior impacted the lives of her children. While respondent-father made an effort to parent the minor child by attending all of the visitations, he played a very passive role and did not present a plan to independently provide for the minor child in the event respondent-mother's parental rights were terminated. Respondent-father remained loyal to respondent-mother and respondents presented themselves as a unit in terms of parenting the minor child.

Although we find no error in the trial court's order terminating both respondents' parental rights under Michigan law, the trial court did not comply with the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1912(a). The fact that respondent-father asserted that his deceased mother was a full-blooded Cherokee and a member of a tribe was sufficient to trigger the notice requirements of the ICWA. *In re IEM*, 233 Mich App 438, 446-447; 592 NW2d 751 (1999). Petitioner erred in failing to provide notice to any agency or tribe. However, in a case such as this where the trial court otherwise properly terminated respondents' parental rights and that there has not been a determination that the ICWA applies, the proper remedy is not necessarily invalidation of the trial court's order, but remand so that proper notice may be ordered. *In re IEM, supra* at 449-450.

The trial court's order terminating respondents' parental rights is conditionally affirmed, and this case is remanded for the purpose of providing notice in accordance with the ICWA. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael J. Talbot